No. 89-507

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC LIGHTING LAND COMPANY,
A CALIFORNIA CORPORATION, FORMERLY
BLUE GOOSE GROWERS, INC.,
Petitioner,

v.

NORMAN JOHNSON D.D.S., FREEMAN VACHER,
FRED KAMRATH AND JOSEPH SOLDWEDEL, AS
REPRESENTATIVES OF CITRUS GROWERS CONTRACTING
WITH BLUE GOOSE GROWERS, INC. D/B/A
YUMA CITRUS CO., DURING 1973–1978,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTION PRESENTED

Whether the costs for a letter of credit without which a supersedeas bond could not be obtained are properly taxable in favor of the prevailing party on appeal under Rule 39(e) of the Federal Rules of Appellate Procedure.

LIST OF PARTIES and RULE 28.1 LIST

The parties to the proceedings below were the petitioner Pacific Lighting Land Company and the respondents, Norman Johnson, D.D.S., Freeman Vacher, Fred Kamrath and Joseph Soldwedel, as representatives of citrus growers contracting with Blue Goose Growers, Inc., d/b/a Yuma Citrus Co., during 1973–1978. All parties below are also before this Court. Pacific Lighting Land Company is a wholly owned subsidiary of Pacific Enterprises.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner Pacific Lighting Land Company respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on June 26, 1989.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is reported at 878 F.2d 297 (9th Cir. 1989) and is reprinted in the appendix hereto, p. 1a. The Judgment of the Ninth Circuit entered June 26, 1989 is reprinted in the appendix, p. 9a. The decision of the Clerk of the United States District

Court for the District of Arizona is unreported. It is reprinted in the appendix hereto, p. 5a. The Order of the District Court is unreported. It is reprinted in the appendix hereto, p. 8a.

JURISDICTION

This action was removed by petitioner to the District of Arizona due to the presence of a federal question under the Perishable Agriculture Commodities Act, 7 U.S.C. § 499B.

On October 9, 1987, the Clerk of the Court for the District of Arizona entered an order of Taxation of Costs in favor of petitioner as the prevailing party in the appeal in *Johnson v. Pacific Lighting Land Company*, 817 F.2d 601 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1020 (1988). On December 14, 1987, the District Court affirmed the clerk's taxation of costs in favor of petitioner.

On respondents' appeal, the Ninth Circuit, on June 26, 1989, entered a Judgment and an Opinion reversing the District Court's Order. No petition for rehearing was brought.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Rule 39(e) of the Federal Rules of Appellate Procedure.

Rule 39. *Costs*.

. . .

(e) *Costs on Appeal Taxable in the District Courts.*

Costs incurred in the preparation and transmission of the record, the costs of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

STATEMENT OF THE CASE

This action was brought by the respondent class against petitioner Pacific Lighting Land Company. The District Court had jurisdiction under 28 U.S.C. § 1331 due to the presence of a federal question under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499B.

After trial to a jury, respondents obtained a judgment against petitioner in the amount of $4.3 million. To stay the judgment during its appeal to the Ninth Circuit, the petitioner obtained a supersedeas bond in the amount of $5.3 million. As a necessary prerequisite to obtaining the supersedeas bond, the petitioner was required to obtain collateral in the form of a letter of credit. During the more than three years of the pendency of its appeal to the Ninth Circuit, petitioner expended a total of $82,841.64 for the costs of the supersedeas bond, $40,368.00 of which was for the bond premiums and $42,473.64 of which was for the letter of credit premiums.

The Ninth Circuit reversed the judgment in favor of the respondent class and remanded the case to the District of Arizona. *Johnson v. Pacific Lighting Land Company*, 817 F.2d 601 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1020 (1988). Pursuant to Rule 39(e) of the Federal Rules of Appellate Procedure, the Clerk of the District of Arizona entered an order of taxation of costs in favor of petitioner which included the costs for the letter of credit used to support the supersedeas bond. The Clerk found that the costs for the

letter of credit were taxable as a "necessary part of defendant's costs in obtaining the supersedeas bond . . . ." Appendix, p. 6a. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, the respondent class appealed the Clerk's taxation of costs for the letter of credit to the District Court, which affirmed.

The respondent class then appealed to the Ninth Circuit which reversed the District Court. The Ninth Circuit held that Rule 39(e) of the Federal Rules of Appellate Procedure does not provide for costs paid for letters of credit. Due to the absence of an agreement between the parties as to the letter of credit costs and because the costs paid for the letter of credit were in addition to the costs of the premiums paid for the supersedeas bond, the Ninth circuit found that it was an abuse of discretion for the District Court to permit them under Rule 39(e).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's refusal to allow recovery of the costs for a letter of credit used to collateralize a supersedeas bond, and without which the bond could not be obtained, is in direct conflict with the reasoning of the First Circuit in *Bose Corporation v. Consumers Union of U.S., Inc.*, 806 F.2d 304 (1st Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). Furthermore, the Ninth Circuit's opinion is divorced from the business reality that in order to supersede large judgments (here, a $5.3 million supersedeas bond obtained in June, 1984) some form of collateral is often necessary. In order to preserve rights pending appeal of increasingly large judgments, costs for obtaining collateral, such as letters of credit, where necessary and not unreasonable, should be taxable under Rule 39(e) to the successful party on appeal.

To supersede the judgment entered in favor of the respondent class, petitioner Pacific Lighting Land Company was required to obtain a supersedeas bond in the amount of $5.3 million. As a necessary prerequisite to obtaining the

bond, petitioner had to obtain a letter of credit. The District Court found that the cost for the letter of credit appeared to be "a necessary part of [petitioner's] cost in obtaining the supersedeas bond and, as such, are deemed to be a taxable cost." Appendix, p. 6a.

The First Circuit earlier had addressed an identical fact situation in *Bose Corporation v. Consumers Union of U.S., Inc.*, 806 F.2d 304 (1st Cir. 1986). The First Circuit in *Bose* was asked to review the District Court's taxation of costs of $1,473.00 for supersedeas bond premiums and $5,218.54 for the cost for a letter of credit used to secure the bond. The First Circuit recognized that Rule 39(e) does not expressly provide for costs paid for letters of credit. However, the First Circuit found no evidence that the charge for a letter of credit was "either unreasonable or resulted in any greater total cost than a supersedeas bond without supporting collateral." *Id.* at 305. Under these circumstances, the First Circuit noted that the District Court's discretion in taxing the costs of the letter of credit should not be disturbed and, therefore, affirmed. The First Circuit affirmed even though the costs for the letter of credit exceeded those for the bond.

Identical to the situation in *Bose*, petitioner sought taxation of the costs for a letter of credit necessary to obtain a supersedeas bond. The District Court found that the letter of credit was necessary and that the costs for the letter of credit were properly taxable. There was no finding that petitioner had either acted unreasonably or that the total costs would have been less if a supersedeas bond without supporting collateral had been purchased. To the contrary, the District Court found that petitioner would not even have been able to obtain a supersedeas bond without the letter of credit. Appendix, p. 6a.

The ruling adopted in *Bose* is directly contradicted by the ruling of the Ninth Circuit. The Ninth Circuit apparently cites *Bose* for an exception to the express language of

Rule 39(e). 878 F.2d at 298. However, the Ninth Circuit rejects the reasoning of *Bose*.

The Ninth Circuit states that *Bose* held that the costs of a letter of credit are equivalent to premiums paid for a supersedeas bond if the "total cost has been no greater than a supersedeas bond without collateral." 878 F.2d at 298. Without distinguishing *Bose* (because it is not distinguishable), the Ninth Circuit found that petitioner's costs for the letter of credit, being in addition to the premiums paid for the supersedeas bond, were not properly taxable. However, in *Bose*, the premiums paid for the letter of credit were also *in addition to* the costs for the supersedeas bond. *Bose Corporation v. Consumers Union of U.S., Inc., supra*, 806 F.2d at 305. There was no evidence that petitioner's combined costs for the letter of credit and the bond were greater than a supersedeas bond without collateral. To the contrary, the Clerk of the District Court made the factual finding that the letter of credit was a "necessary part of [petitioner's] cost in obtaining the supersedeas bond . . . ." Appendix, p. 6a. Thus, the Ninth Circuit should have found that petitioner's costs for the letter of credit were "the equivalent of premiums paid for the cost of a supersedeas bond." The Ninth Circuit refused to permit petitioner to recover the costs for the necessary and not unreasonable letter of credit. This ruling is in direct conflict with that of the First Circuit in *Bose*.[1]

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[1] The Ninth Circuit's opinion also cites the Second Circuit's opinion in *Lerman v. Flynt Distributing Co., Inc.*, 789 F.2d 164 (2nd Cir.), *cert. denied*, 107 S.Ct. 404 (1986). In *Lerman*, the Second Circuit distinguished its earlier opinion in *Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173 (2nd Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). In *TWA*, the Second Circuit held that costs for a letter of credit used in lieu of a supersedeas bond, costs for audits to certify the defendant's net worth, and costs for providing security as collateral were properly taxable under Rule 39(e) as costs of obtaining a supersedeas bond. *Id.* 177–78. In *Lerman*, however, the Second Circuit appeared to limit *TWA* to its facts by prohibiting recovery of borrowing expense in addition to the cost for premiums of a supersedeas bond. 789 F.2d at 167. The Ninth Circuit

In so ruling, the Ninth Circuit was not only in direct conflict with the First Circuit, but also was refusing to permit taxation of a necessary expense for the preservation of petitioner's rights pending its successful appeal. That a supersedeas bond to prevent enforcement of a judgment pending appeal is a taxable cost is made clear by Rule 39(e). Rule 39(e) also explicitly provides that other bonds "to preserve rights pending appeal" are taxable. Since Rule 39(e) was originally adopted in 1967, the dollar amounts of judgments have steadily increased. To effectuate the purpose of Rule 39(e), and to preserve rights pending appeal, judgment debtors such as petitioner are forced to provide collateral in order to obtain supersedeas bonds. In such cases, as the First Circuit in *Bose* recognized, the collateral should be treated as the equivalent of the premiums for the supersedeas bond. The District Court, in its discretion, can decide which uses of collateral are unreasonable (and therefore not equivalent to the costs of supersedeas bonds) and not taxable under Rule 39(e). The Ninth Circuit opinion, however, ignores the business reality that some form of collateral is often necessary to supersede large judgments. By creating a rule prohibiting such costs even where reasonable, the Ninth circuit improperly penalizes judgment debtors who are preserving their rights pending an appeal.

While the dollar amount involved in this appeal may be small, the issue of collateralization of supersedeas bonds is important to every appeal. Civil litigants need guidance from this Court as to whether costs for obtaining collateral for supersedeas bonds, where reasonable and necessary, are recoverable under Rule 39(e).

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opinion, however, only cites *Lerman* for the proposition that where the parties agree to "less expensive substitutes for the costs explicitly authorized in Rule 39(e)," these costs will be properly taxable. 878 F.2d at 298. Because there was no agreement between the parties as to the method of superseding the judgment, the *Lerman* rule is not applicable here. It should be pointed out, however, that the First Circuit in *Bose* rejected *Lerman*. 806 F.2d at 305.

CONCLUSION

For the reasons set forth herein, this petition for certiorari should be granted.

RESPECTFULLY SUBMITTED this 22nd day of September, 1989.

John J. Swenson
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Los Angeles, CA 90067

and

O'CONNOR, CAVANAGH,
ANDERSON, WESTOVER,
KILLINGSWORTH & BESHEARS

By _____
John H. Westover
Larry L. Smith
Counsel of Record for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN R. JOHNSON; LOUISE C. JOHNSON; FREEMAN L. VACHER; HILMA I. VACHER; FRED W. KAMRATH; VERA M. KAMRATH; GERDA E. KLIPFEL; D. CLARK CONDER; RHEA G. CONDER; RUSSELL S. BRAMAN; MAE O. BRAMAN; WILLIAM FORD MONTGOMERY; NELLIE MAE MONTGOMERY; ELLA M. GERLINGER; ALBERT M. CANN; MARY E. CANN; CREW DEVELOPMENT COMPANY, INC., a California corporation, as representatives of citrus growers contracting with Blue Goose Growers, Inc., dba Yuma Citrus Co., during 1973–1978.

Plaintiffs-Appellants,

v.

PACIFIC LIGHTING LAND COMPANY, a California corporation, formerly Blue Goose Growers, Inc.,

Defendant-Appellee.

No. 88-1635

D.C. No. CV-78-0877-RGS

OPINION

Appeal from the United States District Court
for the District of Arizona
Roger G. Strand, District Judge, Presiding

Argued and Submitted
March 14, 1989 – San Francisco, California

Filed June 26, 1989

Before: Melvin Brunetti, Alex Kozinski, and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

COUNSEL

Richard D. Engler, Yuma, Arizona, for the plaintiffs-appellants.

Stephen E. Richman, Phoenix, Arizona, for the defendant-appellee.

OPINION

NOONAN, Circuit Judge:

This case of first impression involves the question of whether the costs of a letter of credit used to secure a supersedeas bond are properly taxable as costs of the appeal.

FACTS

In this class action the plaintiff class secured a trial verdict of over $4 million against the defendant Pacific Lighting Land Company (Pacific). The defendant appealed and obtained a supersedeas bond in the amount of $5.3 million. In order to obtain the bond Pacific was required by the bonding company to obtain a letter of credit as security. Pacific paid premiums on the bond and costs for the letter of credit.

This court reversed the judgment against the defendant and, remanding the case for trial, ordered that appellate costs be taxed. *Johnson v. Pacific Lighting Land Co.*, 817 F.2d 601 (9th Cir. 1987). Pacific submitted its bill of costs to the clerk of the district court showing that it had

paid $40,368 for bond premiums and $42,473.64 as letter of credit costs. Over the plaintiff's objections to taxation of the letter of credit costs, the clerk allowed both items in taxing costs, and the district court approved this figure. The plaintiff appealed the taxation of the letter of credit costs.

ANALYSIS

The general rule on the taxation of costs is that the district court has discretion to fix the costs. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 233 (1964). The discretion exists under Fed. R. Civ. P. 54(d). Such court discretion does not include the authority to tax costs beyond those authorized by statute. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-43 (1986) The discretion conferred by the rule is necessarily restricted by the specific rule governing costs on appeal, which reads as follows:

> **Costs on appeal taxable in the district courts.** Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule. Fed. R. App. P. 39(e)

It is apparent that the rule itself does not provide for costs paid for letters of credit.

[1] Where a letter of credit has been used and the total cost has been no greater than a supersedeas bond without collateral, the charge for the letter of credit has been treated as the equivalent of premiums paid for the cost of a supersedeas bond. *Bose Corp. v. Consumers Union of U.S., Inc.*, 806 F.2d 304, 305 (1st Cir. 1986). Again, where the parties agree to less expensive substitutes for the costs

explicitly authorized in Rule 39(e), there was no problem in allowing these costs. *Lerman v. Flynt Distributing Co.*, 789 F.2d 164, 166 (2d Cir. 1986). But this case is a case where there was no agreement by the parties and where the costs paid for the letter of credit were in addition to the cost of the premiums paid for the supersedeas bonds. There was no authorization in Rule 39 for such costs. It was an abuse of discretion to allow them.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NORMAN JOHNSON, D.D.S., FREEMAN VACHER, FRED KAMRATH and JOSEPH E. SOLDWEDEL, as representatives of citrus growers contracting BLUE GOOSE GROWERS, INC., dba YUMA CITRUS CO. during 1973–1978,	)	CIV 78-877 PHX RGS
Plaintiffs,	)	
v.	)	TAXATION
PACIFIC LIGHTING LAND COMPANY, a California corporation, formerly Blue Goose Growers, Inc.,	)	OF COSTS
Defendant.	)	

A Taxation of Costs hearing was held on October 8, 1987 in Phoenix, Arizona.

Andrew Federhar was present on behalf of the plaintiffs and Stephen Richman was present on behalf of the defendant.

The defendant filed a Bill of Costs on September 11, 1987, requesting taxation of the following costs:

1. Filing Fees – $70.00.

This is a taxable cost pursuant to 28 U.S.C. § 1920(1) and is approved in the amount requested.

2. Court Reporters Transcripts – $4,725.00.

Costs necessary for transcripts is taxable pursuant to 28 U.S.C. § 1920(2) and is approved in the amount requested.

3. Premiums paid for cost of supersedeas bonds – $82,841.64.

Defendent requests $40,368.00 for Schedule of Bond Premiums and $42,473.64 for Letter of Credit Premiums. Plaintiffs object to the cost for the Letter of Credit Premiums noting that Rule 39(e) of the Federal Rules of Appellate Procedure authorizes taxation of "the premiums paid for cost for supersedeas bonds or other bonds to preserve the rights pending appeal . . ." but does not specifically authorize taxation of costs incurred for Letters of Credit.

Plaintiff cites *Lerman v. Flynt Distributing Company, Inc.*, 789 F.2d 164 (2d Cir. 1986) *cert. denied,* _____U.S. _ , 107 S. Ct. 404 (1987), in which taxation of interest cost of the collateral securing the bond was denied. Plaintiff also cites *Trans World Airlines, Inc. v. Hughes,* 515 F.2d 173 (2d Cir. 1975) *cert. denied,* 424 U.S. 934 (1976), in which a Letter of Credit was deemed taxable in lieu of a supersedeas bond. Plaintiff notes that in this case prior court approval was given for the Letter of Credit.

Defendant argues that in *Lerman* the defendant acted unreasonably making *Lerman* distinguishable from the present case. Defendant cites *Bose Corporation v. Consumers Union of U.S., Inc.,* 806 F.2d 304 (1st Cir. 1986), *cert. denied,* 107 S.Ct. 1894 (1987), in which the cost for a Letter of Credit was deemed taxable. Defendant notes that the Letter of Credit obtained in the present case was required to obtain the supersedeas bond.

While there is no clear Ninth Circuit case law on the taxation of Letters of Credit, the Ninth Circuit has ruled that "premium paid to the surety company was a necessary part of defendant's costs and was properly allowed and taxed as such." *Lunn v. F.W. Woolworth,* 210 F.2d 159 (9th Cir. 1954). While this does not specifically address Letters of Credit, the Letters of Credit appear to have been a necessary part of defendant's cost in obtaining the supersedeas bond and, as such, are deemed to be a taxable cost. Defendant's

request for $42,473.64 in costs for Letters of Credit is approved.

Plaintiff objects to the cost for the supersedeas bond on the grounds that the defendant only appealed two of three judgments and that a binding judgment still exists against defendant for violation of the Perishable Agricultural Commodities Act. Rule 39(a) of the Federal Rules of Appellate Procedure states, "if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered . . ." The defendant having been successful in having the judgments awarding damages reversed and the cost of the supersedeas bond being a necessary cost, the request for $40,368.00 for the Schedule of Bond Premiums is approved.

4. Costs as Shown on Mandate of Court of Appeals – $271.00.

Pursuant to the approved Bill of Costs from the Court of Appeals, the costs on the mandate of the Court of Appeals is approved.

Accordingly, costs are taxed in favor of the defendant in the amount of $87,907.64.

Dated this 9th day of October, 1987.

RICHARD H. WEARE, CLERK

By: _____
Lance S. Wilson,
Deputy-In-Charge

CIVIL MINUTES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

DATE: December 14, 1987
PLACE: Phoenix, Arizona Judge Nr: 7019

Deputy Clerk: G. Ochoa Reporter: Tom Stallcup

CIV 78-877-PHX-RGS

Johnson, et. al. vs. Pacific Lighting

(Plaintiff) (Defendant)

MATTER ON FOR HEARING
DOCKET NUMBER ☐ Cont'd on reverse

(285) Pltfs' motion for extension of time to file appeal

APPEARANCES
☐ Cont'd on reverse

Alexander Sierra present for pltf
John Westover and John Swenson present for dft

MINUTES
☐ Cont'd on reverse

Motion argued.

Based on the matters presented, the motion is DENIED.

FURTHER ORDERED setting status hearing for Monday, February 1, 1988 at 9AM.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMAN R. JOHNSON; LOUISE C. JOHNSON; FREEMAN L. VACHER; HILMA I. VACHER; FRED W. KAMRATH; VERA M. KAMRATH; GERDA E. KLIPFEL; D. CLARK CONDER; RHEA G. CONDER; RUSSELL S. BRAMAN; MAE O. BRAMAN; WILLIAM FORD MONTGOMERY; NELLIE MAE MONTGOMERY; ELLA M. GERLINGER; ALBERT M. CANN; MARY E. CANN; CREW DEVELOPMENT COMPANY, INC., a California corporation, as representatives of citrus growers contracting with Blue Goose Growers, Inc., dba Yuma Citrus Co., during 1973–1978.

Plaintiffs-Appellants,

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PACIFIC LIGHTING LAND COMPANY, a California corporation, formerly Blue Goose Growers, Inc.,

Defendant-Appellee.

88-1635

CV-78-0877-RGS

Appeal from the United States District Court
for the Phoenix District of Arizona

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Phoenix District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED.

Filed and entered June 26, 1989